

### The Future of South Africa: perspectives of integrating different cultures; means of law

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# **The Future of South Africa: Perspectives of Integrating Different Cultures – Means of Law**

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## **1 *Introductory observations: the South African miracle (?)***

Growing up as one of the privileged white minority in apartheid South Africa, I was taught that democracy for all and policies aimed at the integration of the various population groups would toll the bell for the death of my future and that of my group. I lived to witness the advent of these once dreaded eventualities and today I do not hesitate to join Nelson Mandela in describing South Africa's transition to democracy as a "small miracle".<sup>1</sup> This does not mean that the said transition was painless or bloodless, but when it came to the crunch we South Africans steered clear of the catastrophic showdown, the Armageddon, that "informed observers" had for many years predicted was lying in store for us. Those who suffered and made sacrifices actively to resist apartheid, thus did so for what eventually turned out to be a negotiated political settlement embodied in two successive constitutions - the transitional Constitution of 1993<sup>2</sup> and the "final" Constitution of 1996<sup>3</sup> - which many believe count among the most progressive constitutional texts in the modern world.

This paper does not focus on South Africa's "small miracle" as such, but on the constitutional and legal means that have been designed to address issues associated with the integration of diverse cultures in a pluralistic society, capitalising on the good start we had. We may not lose sight of the "small miracle" for as Anton Rupert, one of South Africa's foremost business personalities, always reminds us: "(S)he who does not believe in miracles is no realist!" This does not warrant blind euphoria, however, and after we have rightly breathed our sighs of relief, realism enjoins us to ask: is there, in the long run, reason for optimism about an integration of diverse population and interest groups that will sustain the vital endeavour of nation building in South Africa?

My assessment of the situation is informed with considered (and not merely cautious) optimism. The glass of nation building in South Africa is certainly not full (yet) – and will for quite some time not be full – but in my measured estimation it is half *full* and not half *empty*. Optimism is a state of mind, yes, but it is, from time to time, also borne out by empirical evidence. A recent survey, significantly entitled *Truth – Yes, Reconciliation – Maybe: South Af-*

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<sup>1</sup> Cf eg Ralph Lawrence "Introduction. From Soweto to Codesa" in Steven Friedman and Doreen Atkinson eds *The South African Review 7. The Small Miracle. South Africa's negotiated Settlement* 1-12 (Johannesburg Ravan Press 1994) 1.

<sup>2</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>3</sup> Constitution of the Republic of South Africa 1996.

*icans Judge the Truth and Reconciliation Process*,<sup>4</sup> for instance, shows that most South Africans have come to accept that apartheid was a crime against humanity. This includes a majority among formerly privileged (white) South Africans who, by holding this view, acknowledges the reality of the suffering of the other(s) under apartheid. On the question of racial reconciliation there is ambivalence, however. On the one hand, large majorities of South Africans of every race reject the view that South Africa would have been better off if there were no people of other races in the country – and this is encouraging. On the other hand, most South Africans still find it difficult to understand people of other races and therefore continue to subscribe to ingrained racial stereotypes. This lack of understanding of the other(s) seems to induce racially hostile attitudes among black people in particular – probably not because of inherent racism, but because of a lack of interaction with others (and with whites in particular). As I said, the glass is not full...yet.

The last mentioned finding of the survey emphasises that knowledge and an active acknowledgement of *the otherness of the other(s)* is necessary to start recruiting compatriots from mostly dissimilar backgrounds for operation nation building. Mobilisation can only start once the recruits are convinced that it is worthwhile for members of the South African nation to celebrate their intra-national diversity. This, of course, is very much an attitudinal issue, but even the most positive attitudes can come to naught if not backed (and preferably also encouraged) by institutional (in casu legal and constitutional) means. I shall next evaluate some examples of such means, sticking to my last as a legal and constitutional scholar by briefly analysing some relevant constitutional and statutory provisions and assessing trends in the case law dealing with these provisions. I cannot paint a full picture simply because the landscape is too vast. When next I explain how I understand the key terms “culture” and “integration” in the title of this paper, I shall also indicate how I am going to limit the scope of the paper.

## 2 “Culture” and various (possible) modes of “integration”

“Culture”, in its broadest signification, is a collective noun for all forms of expressing the multifarious facets of being human, and the term therefore also alludes to various individuals’, groups’ and communities’ political and economic situation in society. In a narrower sense “culture” is often meant to refer to people’s ethnic identity which, in its turn, is associable with more immediate (and I may even venture to say more intimate) forms of expressing their humanness in day-to-day life. This brings us in the vicinity of issues dealing with the free use of one’s mother tongue; the free exercise of one’s religious and other beliefs; marriage, family life and the upbringing and education of one’s children; et cetera. As well as signifying the accommodation of ethnic diversity, the integration of dissimilar cultures in South Africa thus also has to do with, for instance, both the former oppressors and the formerly oppressed coming to terms with the past, and with the equitable distribution of material means. The constitutional and legal means that have been put in place to aid a process of dealing with the past and with the equitable distribution of material means, therefore also count among the institutional means aimed at furthering the integration of different cultures in South Africa. An institutionalised truth and reconciliation process based on a constitutional compromise<sup>5</sup> was put into op-

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<sup>4</sup> James L Gibson and Helen Macdonald *Truth – Yes, Reconciliation – Maybe: South Africans Judge the Truth and Reconciliation Process* Research Report, Institute for Justice and Reconciliation (Rondebosch Institute for Justice and Reconciliation 2001).

<sup>5</sup> This compromise was embodied in a most unusual Postamble to South Africa’s transitional Constitution.

eration through and conducted in accordance with legislation designed for this particular purpose.<sup>6</sup> The “final” South African Constitution also explicitly guarantees access (but not out-and-out entitlement) to rights conducive to the improvement of the fate of disadvantaged and marginalized sections of the population, but the courts have generally speaking tended to proceed (over-)cautiously in giving effect to these constitutional guarantees.<sup>7</sup>

It cannot be said with certainty yet whether constitutional and legislative provision for national reconciliation and socio-economic empowerment will bear the desired fruit. The survey I referred to earlier indicates that South Africans can certainly not rest on their laurels as far as national reconciliation is concerned. The prosperity gap between the relatively well-to-do 20% and the poor 80% of the population has moreover not really been narrowing since the advent of full democracy. What has changed, though, is that the top 20% that used to be overwhelmingly white is now about 50% black. I mention the uncertainty about success in the areas of national reconciliation and socio-economic empowerment only in passing, for even though they are cultural issues and therefore within the untruncated scope of the topic under discussion, they are areas too vast to traverse in this paper. I can only focus on constitutional and legal measures designed to foster cultural integration in the narrower, ethnic sense. The success of cultural integration in this narrower sense will nonetheless depend largely on how successful national reconciliation and economic empowerment are going to be.

According to the *Concise Oxford Dictionary* “integration” can inter alia mean “the intermixing of persons previously segregated”, but when I speak of the integration of various sections of the South African population I do not simply mean an intermixing of people for the sake of mingling them or stirring them together in a melting pot. I have in mind the consolidation of a diversity of people for the sake of nation building in a manner that will ensure their equal participation in or membership of society.<sup>8</sup>

### **3 Explicit constitutional protection for language and culture**

The South African Constitution lends generous protection to language and culture. Section 6 of the Constitution recognises no less than eleven official languages. They are, in the order listed in section 6(1), Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. Section 6(2) recognises that the indigenous black languages previously enjoyed but a diminished status and the section therefore enjoins the state to take “practical and positive measures to elevate the status and advance the use of these languages”. According to section 6(3) government in the various spheres<sup>9</sup> may use any particular official languages for governmental purposes, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population it serves. The national and provincial governments must, however, use at least two official languages. They must further, according to section 4, regulate and monitor their use of official languages in such a way that all official languages enjoy parity and esteem and be

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<sup>6</sup> Namely the Promotion of National Unity Act 34 of 1995.

<sup>7</sup> Cf eg *Soobramoney v. Minister of Health KwaZulu-Natal* 1997 12 BCLR 1696 (CC); *Grootboom v Oostenburg Municipality* 2000 3 BCLR 277 (C); *Government of the RSA v Grootboom* 2000 11 BCLR 1235 (CC).

<sup>8</sup> According to the *Concise Oxford Dictionary* “to integrate” can also mean to “bring or come into equal participation in or membership of society”.

<sup>9</sup> “Government in the various spheres” is constitutional nomenclature for “government at various levels” or else “the various tiers of government”.

treated equitably. Section 6(5) calls into existence a Pan South African Language Board that must promote and create conditions for the development and use not only of all the official languages, but also of non-official languages such as the Khoi, Nama and San languages as well as sign language.<sup>10</sup>

It could be said that the Constitution provides for an over-generous protection of the various languages. There is nothing wrong with the meticulous recognition of the equal status of various languages, but the principled consistency and even-handedness in this area creates a minefield of practical problems and is, as a matter of fact, hardly sustainable in the day-to-day conduct of the state's business. Increasingly, English is becoming an official lingua franca even though, in terms of its number of mother tongue speakers, it is only the fifth biggest language in South Africa; geographically speaking it is not the most widely spoken language, and there is a substantial number of South Africans who cannot speak, read or write English. Be it as it may, the painstaking constitutional protection of South Africa's various languages is part of the stuff of which the small miracle was made. For at least some time to come we will therefore have to find ways of negotiating the minefield of impracticalities caused by the exceptionally generous recognition of official languages.

Section 30 of the Constitution entrenches everyone's right to use the language and to participate in the cultural life of their choice. Section 31(1) then goes on to state that persons belonging to a cultural, religious or linguistic community *may not be denied* the right, with other members of that community -

“(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

In the light of the cautiously worded introductory statement (“persons...may not be denied the right”) it is fair to conclude that section 31(1) *recognises* the rights mentioned in paragraphs (a) and (b) without guaranteeing them outright in the same way as most other constitutionally entrenched rights. This cautionary reining in of the section 31(1) protection must be read in conjunction with section 31(2) which is at pains to stipulate that section 31(1) rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Section 31(1)(b) nevertheless underwrites, with appreciable constitutional authenticity, *communal and institutional* manifestations of cultural, linguistic and religious rights. It is moreover singular in its explicit recognition of *civil society* as a social catalyst in the exercise of these rights.

In the South African context the protection of cultural rights as ethnic rights is not uncontroversial – hence the guarded wording of section 31. Inspired by (amongst others) an ideology of Afrikaner nationalism, successive apartheid governments enforced racial separation in South Africa with an appeal to the professed aspiration of ethnic groups to practice their culture, to speak their language and to determine their own affairs. The country was balkanised in an effort, so it was maintained, to afford each “ethnic group” a right to self-determination in a territory of its own. And so “the policy of separate development” was born. The oppressive manner in which this policy was implemented and the vastly unequal distribution of territory it authorised, showed it up for what it really was, namely a divide and rule strategy, de-

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<sup>10</sup> Section 5(a). The Board must also promote and ensure respect for other minority languages (such as German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telugu and Urdu) as well as other languages used for religious purposes (such as Arabic, Hebrew and Sanskrit).

signed to preserve white hegemony and privilege in about 87% of the South African territory. As during the 1980s separate development started showing signs of falter, some trenchant Afrikaner nationalists conceded that a territorially based self-determination for ethnic groups was attainable only if Afrikaners were to scale down claims to “their share” in the South African territory. This concession gave rise to the notion of an “Afrikaner homeland” so modest that it would have made the principal architects of apartheid turn in their graves.

Many Afrikaners of this persuasion abandoned the multi-party negotiations at which the process of transition to democracy was agreed on. They also boycotted South Africa’s first democratic elections in 1994. The Freedom Front, a political party comprised for traditionalist Afrikaner nationalists, participated in the elections nonetheless and won seats in both the National Assembly and in provincial legislatures. The party therefore participated in the negotiations shaping the 1996 Constitution - with notable (albeit imperfect) success. They have the cautiously worded sections 31 and, importantly, also 235 of the Constitution to show for their trouble. According to the latter provision the right of the South African people as a whole to self-determination “does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity” in the Republic of South Africa. National legislation will, however, have to lend substance to this “group right”. Section 235 certainly does not proclaim an Afrikaner (or any other) homeland, but leaves room for Afrikaner (and other) traditionalists to contend for some form of territorially based self-determination.

Sections 31 and 235 lend constitutional protection to the formation and organisation of groups on, amongst others, ethnic grounds. However, these provisions do not authorise secessionist behaviour: ethnic group formation may not undermine national unity, but at the same time national unity is also not imposed upon people.

The protection of cultural rights based on ethnic affiliation can also be controversial because reliance on such rights can be (ab-)used to prolong a skewed distribution of privilege in certain areas. A particular language group in a given community may, for instance, claim the right to establish their own state supported school in circumstances where such action may deprive children from the disadvantaged section of that community of decent educational opportunities. Section 29(2) of the Constitution therefore caters for the provision of education in the language of someone’s choice, but does so quite cagily:

“Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

- (a)equity;
- (b)practicability; and
- (c)the need to redress the results of past racially discriminatory laws and practices.”

So far there has been a paucity of in-depth case-law analyses on the application of the constitutional provisions that safeguard language, culture and self-determination as envisaged in section 235, and the courts have made but oblique reference to the said guarantees. However, the South African Human Rights Commission, in its Finding in the *Goudini Investigation*, thought that it was not unconstitutional for a cultural, religious and linguistic association (as envisaged in section 31(1)(b)) to restrict its membership to persons of a particular faith - even

though this meant that persons who, but for their faith, would have qualified for membership of the association, are excluded from financial benefits that only members of the association enjoy.

#### 4 Guarantees of “a traditional way of life”

It is not only a particular brand of Afrikaner nationalist who feels strongly about guarantees for ethnic rights. The advent of democracy has created room for all people in South Africa to celebrate their distinctive ethnic identities. This action may inter alia manifest in the quest of certain traditionalist communities to live their lives in accordance with what is believed to be their own (and their ancestors’) tried and tested way of life. Most South Africans committed to such traditionalist lifestyles are African blacks, but certain Khoi and San communities, the descendants of South Africa’s first nations in the truest sense of the word, have since 1994 also been asserting their right to a lifestyle of their own and have done so in no uncertain terms. The kind of traditionalist community that I am referring to is mostly rural, remote, small-scale and close-knit, and “way of life” in such a community implies, amongst others, living under a localised form of (self-)government by traditional leaders and in accordance with a mostly unwritten code of customary law. Section 11 of the Black Administration Act<sup>11</sup> has traditionally allowed for the application of the customary or indigenous law of such (black) communities, administered by traditional leaders (or “chiefs and headmen” as they are called in the Act). Other courts of law may, however, also invoke customary law in disputes where both litigants live by it, but this is not admissible where, in the judgement of a modernist, western-style court, customary law is in conflict with public policy or the rules of natural justice. Litigants to whose disputes customary law could be applied need not live within small-scale communities only and customary law is often invoked to settle the disputes of urbanised (black) people too and this could be problematic (as the example that will be discussed below clearly shows), because life in an urban suburb or township is lived within social structures (and assumes a dynamic) that differ fundamentally<sup>12</sup> from those in a small-scale, close-knit rural community.

Section 211 of the Constitution recognises the institution, status and role of traditional leadership according to customary law<sup>13</sup> and, in broad terms, authorises traditional authorities to function by virtue of applicable legislation and customs (subject to possible amendment).<sup>14</sup> Section 211(3) enjoins courts to apply customary law “when that law is applicable”. Section 211 as a whole is significantly and explicitly subject to the rest of the Constitution, however.

When a court has to decide whether customary law ought to be applied in a particular case it could find itself on the horns of a dilemma, especially when the customary law considered for application seems to be “accepted law”, but is at the same time likely to encroach on fundamental rights entrenched in the Constitution or to compromise constitutional values. The case of *Mthembu v Letsela and another* that came before the Transvaal Provincial Division of the

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<sup>11</sup> 38 of 1927.

<sup>12</sup> For a succinct exposition of the history and practice of recognising customary law in South Africa cf Lourens du Plessis *An Introduction to Law 3rd edition* (Kenwyn Juta 1999) 67-70.

<sup>13</sup> Section 211(1).

<sup>14</sup> Section 211(2).

High Court on two occasions<sup>15</sup> and then went on appeal<sup>16</sup> graphically illustrates this dilemma. Mr Letsela lived with Ms Mthembu and their five year old daughter, Tembi, in a house in an urban township. Mr Letsela owned the house under a 99-year leasehold. Mr Letsela's parents lived with them. On 13 August 1993 Mr Letsela was gunned down by an unknown assailant and he died without leaving a will. The late Mr Letsela and Ms Mthembu were in the process of entering into a legally recognised marriage under African customary law and the deceased had already paid the first instalment of the customary dowry (or *lobolo*) to Ms Mthembu's parents at the time he was killed. However, on trial the case was eventually (and with the consent of the parties) decided on the basis that no legally recognisable customary union had been consummated between Mr Letsela and Ms Mthembu.

The litigation between Ms Mthembu and the late Mr Letsela's father dealt with the question whether the latter or Tembi was the late Mr Letsela's heir. According to customary law Mr Letsela senior would be the heir. The customary law of intestate succession is premised on the principle of male primogeniture according to which the oldest male descendant inherits everything, *including the responsibility to maintain the deceased's wife/wives and his children still finding themselves within the family*. If there is no male descendant the deceased's father inherits both his estate and his responsibilities. In casu the application of the customary law of intestate succession would therefore exclude Tembi as heir. The fact that she is an illegitimate child aggravated matters for her because under customary law no illegitimate child, not even a son, can inherit from the natural father. The Supreme Court of Appeal made much of this last point, agreeing with the reasoning of the court a quo and upholding the latter's judgement in favour of Mr Letsela senior.

All three judgements in the *Mthembu* case intimate a readiness to recognise the customary law of intestate succession, including those aspects of it that may be controversial measured against values enshrined – and rights entrenched – in the Constitution. In the first *Mthembu* judgement the Transvaal High Court, for instance, cited the constitutional entrenchment of the right to participate in a cultural life of one's choice<sup>17</sup> (section 31 of the transitional and section 30<sup>18</sup> of the final Constitution)<sup>19</sup> as one of the constitutional indicia that the customary law of intestate succession passes constitutional muster.<sup>20</sup> In the second judgement the High Court thought that an adaptation of the customary law of intestate succession to constitutional values is best left to parliament and that a court of law should not take such an exercise for its account.<sup>21</sup> In the judgement on appeal the Supreme Court of Appeal per Mpati AJA inter alia had the following to say:

“To strike down the rule [of male primogeniture under customary law] would be summarily to dismiss an African institution without examining its essential purpose and content. ‘Decisions like these can seldom be taken on a mere handful of allegations in

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<sup>15</sup> *Mthembu v Letsela and another* 1997 2 SA 936 (T) (henceforth “the first *Mthembu* judgement”) and *Mthembu v Letsela and another* 1998 2 SA 675 (T) (henceforth “the second *Mthembu* judgement”).

<sup>16</sup> *Mthembu v Letsela and another* 2000 3 SA 867 (SCA) (henceforth “the judgement on appeal”).

<sup>17</sup> 944B-C; 945A.

<sup>18</sup> See 3 above.

<sup>19</sup> 945A.

<sup>20</sup> 946A.

<sup>21</sup> 686H-687C. See also the judgement on appeal par 40



a pleading which only reflects the facts on which one of the contending parties relies', per Hefer JA in *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) 318 H."<sup>22</sup>

Section 39(2) of the Constitution enjoins a court interpreting legislation and developing the common law *or customary law* to promote the spirit, purport and objects of the Bill of Rights. The Supreme Court of Appeal in the *Mthembu* case, however, declined the invitation (*sic!*) of counsel for Ms Mthembu to develop the common law, holding that on the facts it was not an appropriate case for doing so:

"[W]e would be ill-equipped to develop the rule for lack of relevant information. Any development of the rule would be better left to the legislature after a process of full investigation and consultation, such as is currently being undertaken by the Law Commission."<sup>23</sup>

In sum, the three judgements in the *Mthembu* case lean towards a trusting recognition rather than a critical questioning of customary law, lest traditionalist lifestyles be dismissed in a high-handed, condescending manner. Values embodied and rights entrenched in the Constitution may be relied on, it would seem, to challenge (and strike down) precepts of customary law "so grossly unjust and abhorrent that it could not be countenanced".<sup>24</sup> Commentators have both criticised<sup>25</sup> and commended<sup>26</sup> this approach. If the acknowledgement of the otherness of the other(s) is an essential ingredient of integrating cultures, then generally speaking the courts' attitude is to be commended. However, as Mpati AJA himself correctly points out in the judgement on appeal,<sup>27</sup> the *Mthembu* case essentially deals with competing rights (not between the *self* and the *other*, but between two *others*), and therefore any judicial choice exercised will inevitably compromise at least one (other) individual's rights. That in the *Mthembu* case this individual had to be a minor black girl who would probably be left homeless as a result of the courts' preference for customary law, goes to show how vital such choices are and how enormous the responsibility involved in making them is. There are, as a matter of fact, elements in the three *Mthembu* judgements that are premised on assumptions too glib duly to honour the enormity of the responsibility required for making the choices aforementioned. In the first judgement Le Roux J, for instance, intimated that the customary law of intestate succession, insofar as it encroaches on women's right to equality, may be seen as a constitutionally passable limitation to the said right in terms of the general limitation clause in the Bill of Rights.<sup>28</sup> This is his explanation:

"There are other instances where a rule differentiates between men and women, but which no right-minded person considers to be unfairly discriminatory, for example the provision of separate toilet facilities."<sup>29</sup>

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<sup>22</sup> Par 47 of the judgement on appeal.

<sup>23</sup> Par 40.

<sup>24</sup> The *Mthembu* judgement on appeal, professing to rely on *Du Plessis and others v De Klerk and another* 1996 5 BCLR 658 (CC) par 20.

<sup>25</sup> IP Maithufi "The Constitutionality of the Rule of Primogeniture in Customary Law of Intestate Succession. *Mthembu v Letsela* 1997 2 SA 935 (T)" *Journal of Contemporary Roman-Dutch Law* 61 (1998) 142-147.

<sup>26</sup> AJ Kerr "Inheritance in Customary Law under the Interim Constitution and under the present Constitution" *The South African Law Journal* 115 (1998) 262-270.

<sup>27</sup> Par 39.

<sup>28</sup> Section 33 of the transitional Constitution and section 36 of the 1996 Constitution.

<sup>29</sup> 946B.

This is, to say the least, a feeble analogy given the gravity of the issues that had to be decided in the *Mthembu* case.

From dicta in the first judgement<sup>30</sup> as well as at least one dictum in the judgement on appeal it appears that the courts' argumentation is, amongst others, premised on the assumption that blacks are subject to customary law of their own volition. Mpati AJA, for instance, says the following about a regulation that provides for the distribution, according to customary law, of the estates of blacks who die intestate:

“What needs to be stressed from the outset is that the regulation in issue did not introduce something foreign to Black persons...It merely gave legislative recognition to a principle or system which had been in existence and followed, at least, for decades. It is not inconceivable that many Blacks, even to this day, would wish their estates to devolve in terms of Black law and custom...The existing law...enables Blacks to avoid the consequences of the application of the customary law of succession if they so wish. It is therefore within the power of Blacks to choose how they wish their estates to devolve. If they take no steps to alter the devolution of their estates (as is their right), the resulting consequences cannot be assumed to be contrary to their wishes.”

This (apparently reasonable) argumentation is flawed in three respects. First, the party “hardest hit” by the outcome of the *Mthembu* case is a minor girl unaware of any “choice” she “exercised” (or was supposed to exercise) to be subject to customary law. Second, the court's assumption as to what the late Mr Letsela might have had in mind, is but surmise and conjecture based solely on the court's view of the preferences of a black person in Mr Letsela's position. Outright non-recognition of customary law may amount to high-handed condescendence. Assuming on behalf of (certain) black people that they wish to live by “their law” may be that very condescendence in reverse. Third, customary law, precisely because of its inherently “traditionalist” nature, is not static, but constantly grows and develops and is as a matter of fact particularly apt to development in accordance with section 39(2) of the Constitution.

In short, the “over-recognition” of the customary law of intestate succession in the *Mthembu* case did customary law itself no good, for the three judgements all suggest that the application of customary law in this area and the effectual protection of fundamental rights entrenched in the Constitution are an *either or*: customary law can, by implication, not consistently be construed in a manner promoting “the spirit, purport and objects of the Bill of Rights”. To be recognisable it must remain its primitive (?) self – tolerable, but not an indispensable ingredient of the living law of the nation taking its cue from values enshrined in the Constitution. It may well be that at the time when Mr Letsela died the law of the land other than customary law, that is the common law, had also not developed to the point where it could cater for intestate succession by an illegitimate child, but then it remains unfortunate that the three judgements in the *Mthembu* case created the impression that Thembi's predicament stems from the application of *customary law*. The constitutional injunction to develop customary law in accordance with the spirit, purport and objects of the Bill of Rights is a way of integrating customary law with the “other law of the land” that stands to be developed in a similar manner. This needs not imply a simple equation of dissimilar modes of law whereby differences are denied. Customary law and common law can be developed in accordance with constitutional values *each in its own way*. Much meaningful is, for instance, to be said, in the light of the Bill of Rights, about a male heir's responsibilities as successor to a deceased's maintenance duties –

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<sup>30</sup> 944B, 945A and 946A.

especially in instances where the rights and well-being of minors are at stake. This responsibility is an essential element of the customary law rule of primogeniture and it makes good sense in a close-knit, small-scale rural community. What the position should be in an urban township is a question that has to be addressed through the development of the customary law on this point.

A worrying aspect of the *Mthembu* case is that Thembi had to bear the brunt of illegitimacy while her parents all along intended to marry each other and had actually taken steps towards consummating a customary union the eventual completion of which was thwarted by the untimely death of Mr Letsela. Is there no room for the development of the customary law of marriage to cater for the rights and the interests (and especially the maintenance) of children born from a “union” in the process of being consummated? It must be borne in mind that the required payment of the dowry may delay the formal consummation of a union for a period during which, to all intents and purposes, the partners may consider themselves to be married.

## 5 Religious diversity as cultural diversity

The (free) exercise of religion often manifests itself as “culture” in the narrower (ethnic) sense.<sup>31</sup> It is therefore not surprising that section 31(1)(a) of the Constitution mentions groups’ enjoyment of their culture, *practise of their religion* and use of their language in the same breath. I shall next assess some constitutional and legal means for the accommodation of religiously based manifestations of cultural diversity, and give some concrete examples of how the courts have invoked these means in concrete situations.

### 5.1 The recognition of traditional and religious marriages

Section 15(1) of the Constitution entrenches “the right to freedom of conscience, religion, thought, belief and opinion”. Section 15(3) thereupon states that the entrenchment of religious freedom does not prevent statutory recognition of either “marriages concluded under any tradition, or a system of religious, personal or family law”<sup>32</sup> or of the relevant system itself.<sup>33</sup> No *right* is entrenched, however, and the envisaged legislation (which has not been enacted yet) will not automatically be exempt from constitutional challenges, for the actual statutory recognition of the marriages and the systems aforesaid is required to be consistent with section 15 as a whole as well as with the rest of the Constitution. Section 15(3) caters for the concerns of certain religious minorities, but it is also a source of political controversy. Human rights activists (and feminists in particular) complain of the fact that some religious (just like some traditional<sup>34</sup>) systems of personal and family law discriminate against women.<sup>35</sup> Section 15(3), so it is feared, will therefore not beget the advancement of the status of women in communities adhering to these discriminatory systems.

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<sup>31</sup> See 2 above.

<sup>32</sup> Section 15(3)(a)(i).

<sup>33</sup> Section 15(3)(a)(ii).

<sup>34</sup> See 4 above.

<sup>35</sup> Najma Moosa *An Analysis of the Human Rights and gender Consequences of the new South African Constitution and Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* LLD Thesis University of the Western Cape (Bellville 1997) however, concludes that the recognition of, for instance, Muslim Personal Law subject to the Constitution is feasible, both theologically and from a human rights point of view, on the strength of the particular understanding of the teachings of Islam which she proposes.

Be it as it may, since the commencement of the transitional Constitution in 1994 some significant case law on the recognition of religious marriages has called the conventional prejudices and a chronic intolerance towards some kinds of religious marriages into question, especially in instances where certain individual women (mostly Muslim widows) stood to benefit from a judicial approach more tolerant towards religious marriages. South African courts traditionally held that marriages concluded in accordance with Muslim rites are polygamous and should therefore, on grounds of “public policy”, not enjoy legal recognition.<sup>36</sup> It made no difference whether a marriage was in fact polygamous or not: the potential of a *de facto* monogamous union of becoming polygamous sufficed to attract the aversion of mainstream jurisprudence. Section 15(3) of the Constitution<sup>37</sup> implicitly challenges this prejudice, but as was said previously, the legislative action authorised by that section has not been taken yet.

In *Ryland v. Edros*,<sup>38</sup> a case dealing with a divorced Muslim woman’s claim for (inter alia) maintenance, the Cape High Court held that the transitional Constitution had the effect of assuaging conventional prejudices about Muslim marriages, especially those marriages that are monogamous in fact. Traditionally a (potentially polygamous) Muslim marriage, on account of considerations of public policy, was not recognized officially. A wife to such a union could thus claim maintenance *ex contractu* but not *ex lege* from her husband. However, because the “contract of marriage” between a Muslim husband and wife conceivably violated the *boni mores*, any claim to maintenance (professing to be legally justified) was thought to be unenforceable.<sup>39</sup> In *Ryland v. Edros*<sup>40</sup> the court, however, held that constitutional values call into question a “public policy” that reflects the preferences and prejudices of only one (albeit a dominant) section of a plural society.

Potentially *Ryland v. Edros* presented a step forward for widowed Muslim women. Under the South African law of delict the *claim of the dependant* can be brought against a perpetrator who intentionally or negligently killed a dependant’s “breadwinner.” The plaintiff must prove that the deceased had a *legal duty* (and not, for instance, merely a contractual obligation) to support him or her. The dependant’s claim has thus always been available to a spouse who was lawfully married under civil law and who had an *ex lege* right to support against the deceased. However, a spouse who was married under Muslim law and whose marriage enjoyed no legal recognition only had a contractual right to support against the deceased, and this “weaker entitlement” precluded reliance on the dependant’s claim.<sup>41</sup>

A veritable breakthrough for women thus disadvantaged was the unanimous judgement of the Supreme Court of Appeal in *Amod v Multilateral Motor Vehicle Accidents Fund*.<sup>42</sup> Not only did the court find that, in principle, someone who was a spouse to a Muslim marriage can

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<sup>36</sup> Elsje Bonthuys and Lourens du Plessis “Whither the Validity of Marriages concluded under a System of Religious Law under the Transitional Constitution. *Kalla v The Master* 1994 4 BCLR 79(T)” *SA Public Law* 10 (1995) 200-210 at 201-202.

<sup>37</sup> *Cf supra*.

<sup>38</sup> 1997 1 BCLR 77 (C).

<sup>39</sup> *Ismail v. Ismail* 1983 1 SA 1006 (A).

<sup>40</sup> 1997 1 BCLR 77 (C) 91I, 92B, 92I-93B.

<sup>41</sup> This was held in a series of cases of which *Seedat’s Executors v. The Master*, 1917 A.D. 302 and *Ismail v. Ismail*, 1983 (1) SA 1006 (A) were the leading ones. Section 31 of the Black Laws Amendment Act 76 of 1963 explicitly avails a (female) spouse to a black customary union, which also used to be no legally recognized marriage, of the dependant’s claim.

<sup>42</sup> 1999 4 SA 1319 (SCA).

successfully invoke the dependant's claim, but in doing so it explicitly refrained from constitutionalising the issue.<sup>43</sup>

Assessing the *boni mores* ("good morals") in South Africa at the time when the plaintiff's alleged cause of action arose (that is, the date on which her husband was killed, namely 25 July 1993) the court concluded that a "new ethos" had by then "informed the determination of the *boni mores* of the community".<sup>44</sup> This ethos is substantially different to the one that spawned the traditional non-recognition of "potentially polygamous unions". According to Mahomed CJ the political and constitutional changes that had taken place up to 25 July 1993, are all evidence of the new ethos of "tolerance, pluralism and religious freedom"<sup>45</sup> that admits of the legal recognition of a *de facto* monogamous Muslim marriage for purposes of the defendant's claim.

### 5.2 Cultural idiosyncrasies in the practice of religion

Legal and constitutional accommodation of a group's – and especially a minority group's – cultural distinctiveness becomes all the more controversial as the idiosyncrasy of its cultural practices increases and "the majority" perceives of such practices as immoral or even dangerous. We have seen this in South Africa too, especially in instances where cultural manifestations of some religious beliefs have challenged conventional wisdom of what is right and wrong, and of what is harmful to the public interest and what not. This wisdom may or may not be shared by the (f-)actual majority. It is enforced nonetheless because state institutions that wield the power of the sword accept its truth.

One of the most difficult and controversial freedom of religion cases to have come before South African courts concerns the professional future of one Gareth Prince, a consumer of cannabis sativa (or "dagga" as it is known in South Africa) for spiritual, medicinal, culinary and ceremonial purposes as an integral part of practising his religion as Rastafarian. Prince successfully completed his legal studies to a point where, qualification-wise, he became eligible to be registered as a candidate attorney doing community service. He had twice been convicted of the statutory offence of possessing dagga, however, and this raised doubts as to whether he was a fit and proper person to be registered as a candidate attorney, especially in the light of his declared intention to continue using dagga. The Law Society of the Cape of Good Hope refused him registration whereupon he challenged the society's decision in the Cape High Court.<sup>46</sup> The court held that the statutory prohibition on the use of dagga was meant to protect public safety, order, health and morals and that these considerations outweighed (and thus limited) the right of Rastafarians to practice their religion through the use of dagga. The court thus refused to overturn the law society's decision.

Prince appealed to the Supreme Court of Appeal<sup>47</sup> which is South Africa's court of final instance in the adjudication of all but constitutional issues. His appeal was dismissed and he then lodged an appeal with the Constitutional Court, the final court of appeal in constitutional matters. At the time of writing this paper, the Constitutional Court's final judgement in this matter is still pending although the court has handed down quite a significant interim judge-

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<sup>43</sup> Par 30 of the judgement.

<sup>44</sup> Par 21.

<sup>45</sup> Par 20.

<sup>46</sup> *Prince v President of the Law Society, Cape of Good Hope and others* 1998 8 BCLR 976 (C).

<sup>47</sup> *Prince v President, Cape Law Society and others* 2000 3 SA 845 (SCA).

ment that will be considered more fully below. But first some remarks about the Supreme Court of Appeal's judgement in the *Prince* case. This court's mode of reasoning is suspect, irrespective of whether one agrees with the outcome of its decision. Overawed by the prospect of possibly admitting a dangerous dagga smoker to the distinguished ranks of the legal fraternity, the court paid little regard to what the right to free exercise of religion by a Rastafarian or, for that matter any other religious adherent, *by definition* entails. It limited the right before making an effort to determine its scope. This is a rights-unfriendly manner of dealing with fundamental rights. Prince is moreover not but an individual using dagga while on some crazy religious frolic of his own. He is a member of a denominational community that shares a particular belief on the use of dagga and that conducts an observance exposing its members, as a vulnerable minority, to both the manifest and hidden prejudices of a majority who condemns dagga smoking downright. This aspect of the case the Supreme Court of Appeal totally ignores, but the Constitutional Court in its interim judgement<sup>48</sup> does demonstrate an alertness to the dilemmas associable with Rastafarians' minority position.

The Constitutional Court concluded that neither the applicant nor the respondents in the *Prince* case had - in the course of the litigious process commencing in the Cape High Court - adduced sufficient evidence for a court finally to decide the crucial controversies involved in this case. From the applicant the court needed more evidence as to precisely how and in which circumstances Rastafarians smoke dagga as part of a religious observance, and as to what this observance precisely entails. From the respondents (which include the minister of justice and the director of public prosecutions in the Western Cape) the court required evidential elucidation as to the practical difficulties that may be encountered should Rastafarians be allowed to acquire, possess and use dagga. Both sides were given the opportunity to adduce the required evidence and the case was postponed. This was something quite extraordinary for a final court of appeal to do, since parties are normally required to adduce all the necessary evidence at the time when an action is brought in the court of first instance (in this case the Cape High Court). It is only in rare circumstances that litigants are allowed to adduce additional evidence on appeal. The Constitutional Court, however, thought that such circumstances existed in the present case and some of the arguments advanced to reach this conclusion, show quite a profound sensitivity not only to the applicant's dilemma, but also to that of a minority religious community such as the Rastafarians.<sup>49</sup> Such judicial responsiveness to the group and commu-

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<sup>48</sup> *Prince v President, Cap Law Society and others* 2001 2 BCLR 133 (CC).

<sup>49</sup> The court per Ngcobo J made the following observations:

"The constitutional right to practise one's religion asserted by the appellant here is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society..." (par 25 of the judgement).

"[T]he appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest — it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation. They are perceived as associated with drug abuse and their community is perceived as providing a haven for drug abusers and gangsters. During argument it was submitted on behalf of the A-G that if a religious exemption in favour of the Rastafari were to be allowed this would lead to an influx of gangsters and other drug abusers into their community. The assumption which this submission makes demonstrates the vulnerability of this group. Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not,

nal concerns involved in cultural manifestations of the right to freedom of religion, coming from of South Africa's highest court in constitutional matters as it were, bodes well for the onset of a constitutional jurisprudence sensitive to the vulnerability of (eccentric) cultural and religious minorities in society.

However, a similar judicial responsiveness is by and large absent from two of the three judgements handed down in *Bührmann v Nkosi and another*<sup>50</sup> in the Transvaal Provincial Division of the High Court as well as in the Supreme Court of Appeal's judgement on appeal (*Nkosi and another v Bührmann*<sup>51</sup>). Ms Nkosi, a widow, lived on Mr Bührmann's farm from 1966 to 1981 with her late husband and their children and again from 1987 onwards with two of her sons. Mr Bührmann took charge of the farming operations in 1970 from his father (Bührmann senior). Ms Nkosi's husband was employed as a labourer on the farm between 1966 and 1981 whereupon he moved to another farm with his family. He passed away in 1986. Ms Nkosi returned to Mr Bührmann's farm in 1987 and continued to live there with the latter's permission. When the Extension of Security of Tenure Act<sup>52</sup> came into operation on 28 November 1997 Ms Nkosi (in terms of the act) acquired the status of an "occupier" of the land where she lived and together with that a number of rights specifically provided for in the act. Among these rights are the right to reside on and use the land<sup>53</sup> as well as the rights (as occupier) to a family life in accordance with the culture of the family<sup>54</sup> and freedom of religion, belief, opinion and expression.<sup>55</sup> The right of any person (and not only an occupier) to visit and maintain family graves on land that belongs to another person is also guaranteed, but the owner of the land may impose such conditions as are reasonable "to safeguard life or property or to prevent the undue disruption of work on the land".<sup>56</sup>

Ms Nkosi's son, Petrus, who was born on the Bührmann farm in 1968, died in 1999 and Mr Bührmann refused Ms Nkosi permission to bury her son on the farm where she and the said son had been living legally. Mr Bührmann approached the High Court in Pretoria for an order prohibiting the burial, but a single judge (Cassim AJ) refused the order. Mr Bührmann then successfully appealed to a full bench of the Transvaal Provincial Division of the High Court whereupon Ms Nkosi unsuccessfully appealed to the Supreme Court of Appeal. Only the judgements handed down by the full bench and by the Supreme Court of Appeal have been reported and they are the judgements considered in the discussion.

Ms Nkosi's case was that she had a right to bury her son on the farm. First, she alleged that in 1968 when one of her grandsons died, he was buried on a piece of land pointed out by Mr Bührmann senior for that purpose (and subsequently set aside for family burials). Second, Ms Nkosi relied on her right to freedom of religion and belief alleging that according to her custom and religious belief a family member who passes away is only physically but not also spiritually separated from those who are left behind. Such a deceased should therefore be buried in a place where the surviving family members can communicate spiritually with him or

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the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law" (par 26 of the judgement).

<sup>50</sup> 2001 1 SA 1145 (T).

<sup>51</sup> SCA case no 1/2000; judgement delivered on 25 September 2001.

<sup>52</sup> 62 of 1997.

<sup>53</sup> Section 6(1) of the act.

<sup>54</sup> Section 6(2)(d).

<sup>55</sup> Section 5(d).

<sup>56</sup> Section 6(4).

her on a daily basis. The late Mr Nkosi and his mother performed the rituals necessary to declare and introduce the piece of land pointed out by Mr Bührmann senior as such an “official home for the ancestors”. The late Mr Nkosi himself was not buried there because at the time of his death the family was living on another farm and they encountered transport difficulties that made it impossible to hold Mr Nkosi’s funeral on the Bührmann farm.

In essence then the issue in the *Nkosi* case was how to weigh Ms Nkosi’s right to her religious beliefs against Mr Bührmann’s right (of ownership) to his land. Apart from the unreported judgement of Cassim AJ, four judgments were written in this case: three by judges of the Transvaal Provincial Division of the High Court and one by Howie JA on behalf of an unanimous Supreme Court of Appeal. Three of these judgements (two in the court a quo and the judgment on appeal) lent precedence to Bührmann’s right of ownership to his land above Ms Nkosi’s right to her religious beliefs. The assumptions underlying the line of reasoning in these judgments is succinctly stated by Howie JA (in the judgement on appeal) as follows:

“My conclusion, therefore, is that the right to freedom of religion and religious practice has internal limits. It does not confer unfettered liberty to choose a grave site nor does it include the right to take a grave site without the consent of the owner of the land concerned. It follows that s 5(d) of the Act does not, when viewed in isolation, confer the right which the appellant claims.”<sup>57</sup>

Satchwell J, in the Transvaal Provincial Division of the High Court, voiced a similar sentiment and explained her preferences in some detail:

“The Constitution clearly envisages that the second respondent [Ms Nkosi] is free to hold and act upon her religious convictions and that she is not to be interfered with or discriminated against in regard thereto. However, we were referred to no authority and I know of none which imposes on a private individual a positive obligation to promote the religious practices and beliefs of another at one's own expense. If such were envisaged either by the Constitution or the Extension of Security of Tenure Act, each occupier who professed a religion or set of beliefs would be entitled to require of the landowner that he permit the erection of a church or tabernacle or other place of worship on his land in circumstances where the occupier's religion required adherents to gather together with symbols of faith in an enclosed building. Conceivably, the landowner could be obliged to make separate allocations of land for such purposes in respect of each denomination or sect or religion professed by individual occupiers.

Freedom of religion, belief and opinion, no less than other rights, must be exercised within the parameters of the Constitution and in the present case where reliance is placed upon s 5 of the Extension of Security of Tenure Act.”<sup>58</sup>

This seems to be a rather reasonable way of approaching the matter, but on closer analysis it gives rise to at least one critical question: why is Ms Nkosi’s right to religion and belief from the outset looked upon as a right that is (and has to be) limited, but Mr Bührmann’s entitlement to his property, which does not enjoy outright protection *as a constitutional right*, is not limited in a similar manner? The South African Constitution does not protect or entrench property rights as constitutional (or public law) rights. Property rights enjoy protection as private law rights under the common law. Section 25 of the Constitution guarantees a “due proc-

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<sup>57</sup> Par 49.

<sup>58</sup> 1155D-F.



ess of law” (meeting certain specified requirements) in instances where property (and rights to property) are diminished or taken.

Ngoepe JP in his (dissenting) minority judgement in the Transvaal Provincial Division intimated that the constitutional recognition of a right to freedom of religion and belief is not worth much if it does not include an entitlement to practise out or materialise the protected religion and belief.<sup>59</sup>

“It is well known that there is a strong relationship between people's religion and the way in which, in the manifestation of such a belief, they would want their dead to be buried. For example, one religion requires that the dead be buried within a certain period; practitioners of another conventional religion demand that their dead be buried with their heads facing to the west in anticipation of the great day of re-awakening. All these are manifestations of certain religions and beliefs, apparently aimed at helping the deceased achieve a better hereafter life or world. To acknowledge the respondent's right to practice and manifest her religion, but bar her from interring her son at a place and in a manner that would give meaning to her right of religion and belief could amount to no more than paying mere lip service to such a right.

The difficulty in the present case is that the manifestation of the respondent's religion and belief, in the form of the burial of her son on the farm, would constitute an encroachment on the owner's right of ownership. But ss 5 and 6, as well as other sections of the Act, are specifically aimed at making some inroad into that right. The parties' competing rights must therefore be weighed against each other: It cannot be reasonably expected that the respondent exhumes the seven already buried to go and found a new 'home'; there is already an area for burial; other employees of the respondent bury on that farm with the appellant's permission; the area the appellant loses to the grave is probably 1 m by 2 m; and, apparently in terms of the law as it stands, the respondent will in any case still be entitled to visit the existing seven graves. I am not persuaded that the loss of a 1 m by 2 m area constitutes such a drastic curtailment of the appellant's right of ownership as to justify denying the respondent the right I have already described in detail.”<sup>60</sup>

Ngoepe JP's approach distinguishes itself from those of the other judges in really *weighing* Bührmann's and Nkosi's rights against each other accepting that the rights involved on both sides are (at least) equally limitable. He does not proceed on the assumption that someone's right to religious beliefs and the entitlement to perform the rituals associated with those beliefs are, in principle, second to someone else's entitlement to his or her property. Such an approach is significant for the effectual acknowledgement, in legal terms, of *the others'* culture, taking into account that, under the apartheid system, black people living and working on white farms were, in their day to day lives and in their self-expression of a lifestyle, to a large extent at the mercy of farm owners. The relationship between farm owners and black people living on their land very much resembled the relationship between the feudal lords of old and their vassals.

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<sup>59</sup> 1160F-H.

<sup>60</sup> 1161C-G.

## 6 Concluding observations

If someone were to look at the constitutional, statutory and case law examples I discuss in this paper, (s)he may be tempted to conclude that I have not dealt with means of law designed to facilitate the *integration* of different cultures, but rather their *separation*. That would be a superficial reading of my argumentation, though. I certainly cherish the idea of nation building and will devote all my energy and expertise to co-operate with like-minded compatriots in putting the idea to practice and in relying on all practicable means, including legal and constitutional measures, in quest of doing so. However, the ideal will remain unfulfilled, I believe, if the law and the Constitution are invoked, in a strong arm fashion, trying to effect the integration of the different cultures in South Africa by concocting a melting pot. The law and the Constitution can do no more than to aid the facilitation of a process of consolidation as precondition to nation building, and this process will fail if the reality of deep-seated, cultural differences among various sections of the population are denied or simply thought away. These differences should actively be acknowledged instead, showing each and every individual South African that South Africa is home to her or him *as (s)he is*, and that there is no blueprint-like assertion of her or his humanness that preconditions full access to the entitlements of South African citizenship.

Loyalty to a nation, just like charity, begins at home with the more immediate and intimate expression of citizens' humanness in day-to-day life. From this point of departure it makes sense to negotiate (as we in South Africa have done) and participate in realising (as most of us are hopefully doing) a legal and constitutional dispensation that unite all citizens in at least respecting (but hopefully also valuing) the otherness of the other(s). If we do this we can also all start celebrating our diversity in concert and yet each one (and each group) in her or his (or its) distinctive way. This is the stuff that a nation is made of; this is the soil in which a common loyalty (and devotion) to a country grows - among people and peoples as diverse as the people and peoples of South Africa.

In short, we in South Africa have lived through the dismal failure of a system that tried to force cultural segregation upon people, and we are still to a large extent left carrying the can of this failure. However, the lesson to be learnt from our failure is not simply that a forced segregation of cultures is futile (which of course it is), but that culture as a dynamic reality is spectacularly ill at ease in any straitjacket – that of forced segregation as much as that of forced integration.

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